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Demag (M) Sdn Bhd v Greenlinx Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-694 OF 2010
KN SEGARA, CLEMENT SKINNER AND ANANTHAM KASINATHER JJCA
18 JANUARY 2012

C

Civil Procedure — Trial — Retrial — Material witness unavailable — Agreement of postponement by both parties — Absence of party — Application for postponement rejected — Claim struck out — Application for reinstatement — Whether failure of retrial would result in miscarriage of justice

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The present appeal arose when the appellant was absent on 25 March 2009, the date set down for trial, due to the belief that the respondent's witness would be unavailable. Earlier, the appellant was informed by the respondent of the former's wish to postpone the trial as its material witness was abroad. The appellant's former solicitors confirmed that they did not have any objection. However, on the day of the trial, the witness showed up. The appellant's solicitor applied for postponement but it was rejected. Subsequently he applied to be discharged from representing the appellant due to their communication breakdown. Since the appellant was unrepresented, counsel for the respondent applied for the appellant's claim to be struck out and this application was allowed. The trial proceeded with the trial of the respondent's counterclaim. Although it was fixed for three days, the trial was concluded on the same day of the appellant's absence. The date of the decision was fixed ('the 12 May 2009 judgment') for two months later and the appellant was informed through a letter which did not reach her. Some five months later, the appellant filed a summons in chambers to reinstate its claim and to set aside the 12 May 2009 judgment. This application was dismissed as the judge found that the appellant failed to give sufficient reasons to explain their absence on 25 March 2009. The appellant averred that when considering an application to reinstate, the court had the duty to balance the two competing interests of ensuring finality in litigation as a matter of legal principle against the likelihood of a real miscarriage of justice on the facts if reinstatement is disallowed. Further, there was no evidence that the appellant made deliberate decision not to attend the trial fixed. By relying on O 35 r 1(2) of the Rules of the High Court 1980 ('RHC'), the respondent submitted that the appellants had failed to attend court despite knowing some six months later that the claim had been fixed for hearing.

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Held, allowing the appeal and setting aside the order with no order as to costs:

(1) Counsel for the appellant was present in the court when the appellant's claim was called for trial to safeguard its interest at the commencement of the trial. This was not a case where only one part was present when the appellant's claim was called for trial so as to enable the court to proceed under O 35 r 1(2). The learned judge should have either dismissed the application for discharge or adjourn the trial to the following day since the trial was fixed for hearing over three days (see paras 13–14).

(2) The appellant's absence in the court on the morning of the trial was more likely due to a misunderstanding between the two solicitors rather than due to a conscious decision by the appellant not to attend the court. The predominant factor to be considered by the court in an application of this nature was whether the appellant's conduct amounted to an election on its part to not attend the court. There was no evidence that the appellant made a conscious decision to not attend the trial (see para 15).

(3) The margin profit running into a few thousand per cent clearly demanded close examination of the respondent's evidence led in support of the respondent's counterclaim by the trial judge. There was nothing to suggest that the trial judge did this as no grounds have been provided, to-date (see para 16).

(4) After considering the two competing interests, the justice of the case demanded for a re-trial. The fact that the trial proceeded in the absence of the appellant at trial afforded no justification for not providing the grounds for the judgment requiring the appellant to pay millions with further damages to be assessed to the respondent. A re-trial would address this anomaly (see para 17).

[Bahasa Malaysia summary

Rayuan ini berbangkit apabila perayu tidak hadir pada 25 Mac 2009, tarikh yang ditentukan untuk perbicaraan, atas kepercayaan bahawa saksi responden tidak dapat menghadirkan diri. Sebelum ini, perayu telah diberitahu oleh responden tentang hajatnya untuk menangguhkan perbicaraan memandangkan saksi materialnya berada di luar negara. Peguam terdahulu perayu telah mengesahkan bahawa mereka tiada sebarang bantahan. Walau bagaimanapun, pada hari perbicaraan, saksi telah menghadirkan diri. Peguam perayu telah memohon untuk penangguhan tetapi telah ditolak. Selanjutnya, dia memohon untuk dilepaskan daripada mewakili perayu disebabkan kegagalan komunikasi di antara mereka. Memandangkan perayu tidak diwakili, peguam untuk responden telah memohon untuk tuntutan perayu dibatalkan dan permohonan tersebut telah dibenarkan. Perbicaraan tersebut diteruskan bersama perbicaraan tuntutan balas responden. Meskipun ia telah

ditetapkan untuk tiga hari, perbicaraan telah diputuskan pada hari ketidakhadiran perayu. Tarikh keputusan telah ditetapkan ('penghakiman 12 Mei 2009') untuk dua bulan kemudian dan perayu telah dimaklumkan dengan sepucuk surat yang tidak diterima olehnya. Sekitar lima bulan kemudian, perayu telah memfailkan saman dalam kamar untuk menghidupkan semula tuntutannya dan untuk mengetepikan penghakiman 12 Mei 2009. Permohonan tersebut telah ditolak setelah hakim mendapati bahawa perayu telah gagal untuk memberikan alasan-alasan yang mencukupi untuk menjelaskan ketidakhadirannya pada 25 Mei 2009. Perayu menegaskan bahawa semasa mempertimbangkan permohonan untuk menghidupkan semula, mahkamah mempunyai kewajiban untuk membuat imbangan di antara kedua-dua kepentingan bersaing iaitu untuk memastikan kemuktamadan dalam litigasi sebagai perkara prinsip undang-undang berlawanan dengan kebarangkalian ketidakadilan sebenar terhadap fakta sekiranya penghidupan semula tidak dibenarkan. Selanjutnya, tidak terdapat apa-apa keterangan bahawa perayu telah dengan sengaja membuat keputusan untuk tidak menghadiri pebicaraan yang telah ditetapkan. Bersandarkan kepada A 35 k 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), responden berhujah bahwa perayu-perayu telah gagal untuk menhadiri mahkamah meskipun telah mengetahui enam bulan kemudian bahawa tuntutan telah ditetapkan untuk perbicaraan.

Diputuskan, membenarkan rayuan dan mengetepikan perintah tanpa perintah kepada kos:

(1) Peguam untuk perayu hadir dalam mahkamah apabila tuntutan perayu telah dipanggil untuk perbicaraan bagi melindungi kepentingannya semasa permulaan perbicaraan tersebut. Ini bukanlah kes di mana hanya sebahagian yang hadir apabila tuntutan perayu telah dipanggil untuk perbicaraan bagi membolehkan mahkamah meneruskannya mengikut A 35 k 1(2). Hakim yang bijaksana sepatutnya sama ada menolak permohonan untuk melepaskan atau menunda perbicaraan ke hari berikutnya memandangkan perbicaraan telah ditetapkan untuk perbicaraan untuk tiga hari (lihat perenggan 13–14).

(2) Ketidakhadiran perayu dalam mahkamah pada pagi perbicaraan lebih berkemungkinan disebabkan oleh salah faham di antara kedua-dua peguam daripada keputusan yang disedari oleh perayu untuk tidak hadir ke mahkamah. Faktor dominan terdahulu yang harus dipertimbangkan oleh mahkamah dalam satu permohonan yang bersifat sebegini adalah sama ada tindakan perayu membawa kepada pemilihan pada pihaknya untuk tidak menghadiri mahkamah. Tidak terdapat sebarang keterangan bahawa perayu telah membuat keputusan yang disedari untuk tidak menghadiri perbicaraan (lihat perenggan 15).

(3) Margin keuntungan sebanyak beberapa ribu peratus dengan jelas

memerlukan pemerhatian teliti hakim perbicaraan terhadap keterangan responden yang menyokong tuntutan balas responden. Tiada apa-apa yang menunjukkan bahawa hakim perbicaraan telah melakukan sedemikian memandangkan tiada alasan yang diberikan, sehingga kini (lihat perenggan 16).

(4) Setelah mempertimbangkan kedua-dua kepentingan bersaing, keadilan kes ini memerlukan perbicaraan semula. Fakta bahawa perbicaraan telah diteruskan dalam ketiadaan perayu semasa perbicaraan tidak memberikan sebarang justifikasi untuk tidak memberikan alasan-alasan penghakiman yang memerlukan perayu untuk membuat bayaran berjuta-juta bersama ganti rugi yang akan dinilai kepada responden. Perbicaraan semula akan menanganinya secara berasingan (lihat perenggan 17).]

Notes

For cases on retrial, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8828–8829.

Cases referred to

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (distd)
Shocked & Anor v Goldschimdt & Ors [1998] 1 All ER 372, CA (distd)
Yogananthy AS Thambaiya v Idris Osman [2002] 7 CLJ 531, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 35 r 1(2), O 64 r 5(1)

Appeal from: Civil Suit No: MT 5 (MT3)—22–538 of 2003 (High Court, Shah Alam)

Loh Siew Cheang (Tay Hong Huat, Yap Mong Jay and Choo Jui Lin with him) (Tay & Helen Wong) for the appellants.
Raymond Mah (CC Gane and QS Kung with him) (Mah Weng Kwai & Associates) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] On 28 October 2008, the appellant's claim and the respondent's counterclaim were set down for trial from 25 March 2009–27 March 2009. On the morning of the trial, counsel representing both parties were present but the appellant/plaintiff was absent. According to counsel for the appellant, the appellant was absent because its former solicitors genuinely believed that the trial would not proceed on the scheduled dates since the respondent's witness

was abroad and was not available (see para 7 of the affidavit of Mr See Siew Cheng affirmed on 7 August 2009 at p 105 of AR).

[2] This belief of the appellant's former solicitors was induced by the following facts. By letter dated 16 March 2009, the respondent's solicitors informed the appellant's former solicitors of the respondent's intention to seek a postponement of the trial as the respondent's director Mr Peter Gottschalk was then overseas. By letter dated 16 March 2009, the appellant's former solicitors confirmed that they did not have any objection to the respondent's request for postponement. However, this request was refused by the judge which refusal was duly notified to the then solicitors for the appellant on 20 March 2009. It is not in dispute that the respondent's solicitors' application for adjournment was because their principal witness was not free to attend court on the trial dates and that this fact was made known to the then solicitors for the appellant.

[3] Following the rejection of the application for postponement, the principal witness for the respondent then made himself available to attend court and was present in court on the trial dates. However, according to the former solicitors for the appellant, his availability and that he, would be attending the court was not made known to them. Indeed, the true picture according to the former solicitors is that both counsel in a telephone conversation held after the rejection by the court of the respondent's request for the adjournment, had agreed that the appellant's counsel would request for an adjournment on the morning of the trial since the respondent's solicitor was not ready with her witness. For this reason, the appellant's then counsel did not expect his application for postponement to be resisted by the respondent's solicitors (see pp 202–204 of the appeal record).

[4] Accordingly, at the commencement of the trial, counsel for the appellant applied for the adjournment readily expecting counsel for the respondent to support his application. However, according to him, counsel for the respondent after initially leaving the matter to the court, opposed the application for the adjournment when the court insisted that counsel had to take a stand on the application. According to the then counsel for the appellant, counsel for the respondent never notified him that she was ready for the trial and that her witness would attend court between their telephone conversation and the commencement of the trial (see pp 202–204 of AR).

[5] Following the rejection of his application for postponement, counsel for the appellant promptly applied orally for his firm to be discharged from continuing to act for the appellant purportedly because his firm was unable to communicate with the appellant. The respondents' solicitors informed the court that they had no objection to the appellant's former solicitors application

save that they proposed to proceed with the trial. The judge then allowed the appellant's former solicitors application thereby resulting in the appellant not being represented when the trial commenced shortly thereafter. Upon the commencement of the trial, counsel for the respondent promptly applied for the appellant's claim to be struck out and for the judge to proceed with the respondent's counterclaim. The judge allowed the respondent's application to strike out the appellant's claim with costs. Immediately thereafter, the learned trial judge proceeded with the trial of the respondent's counterclaim. Mr Peter Gottschalk ('PW1') gave evidence for the respondent. The trial was concluded on the same morning and the judge directed the respondent's solicitors to file their written submission on 27 April 2009 and fixed the counterclaim for decision on 12 May 2009.

WHAT HAPPENED AT THE TRIAL

[6] What transpired on the morning of 25 March 2009 can be captured from the notes of proceedings recorded by the judge at pp 12–15 of 'rekod rayuan tambahan'. We pause to observe that although the trial was fixed for three days, the learned trial judge on the application of counsel for the respondent proceeded to strike out the appellant's claim and completed the hearing of the counterclaim on the same morning in the absence of the appellant. After receiving the evidence of the respondent's only witness, the judge fixed the matter for the filing of submissions and decision on 12 May 2009. According to the respondent's solicitors, they forwarded their written submissions on the counterclaim to the court vide letter dated 24 April 2009 and forwarded by AR registered post a copy of the respondent's written submission and bundle of authorities to the appellant at its business address. The appellant was also informed in this letter that the counterclaim was fixed for decision on 12 May 2009. However, as the appellant had moved to a new address, this letter did not reach the appellant (see p 193 of AR). On 12 May 2009, the learned trial judge allowed the respondent's counterclaim with costs (see p 38 for order of court).

EVENTS AFTER THE TRIAL

[7] On 7 August 2009 (some five months after the counterclaim had been allowed) the appellant filed a summons in chambers to re-instate its claim and to set aside the judgment dated 12 May 2009. According to counsel for the appellant, the appellant was not served with the order or judgment of the court on the counterclaim until 4 August 2009. The appellant's new solicitors only realised that the claim had been struck out and judgment entered on the counterclaim when they received the letter from the solicitors for the

respondent on 13 July 2009 (see para 4 of the affidavit of Mr See Siew Cheng of 7 August 2009 (p 103 of the appeal record)).

[8] On 25 February 2010, the summons was heard on its merits by another judge of the Shah Alam High Court. The new judge dismissed the application to reinstate and set aside the counterclaim primarily because in the judge's view, the appellant had failed to give sufficient reasons to explain their absence in court on 25 March 2009. Her Ladyship opined that:

> to say that the solicitors could not be in touch with the plaintiff to get instruction is not predominant consideration for the court to consider.

Her Ladyship relied on the judgment of the High Court in the case of *Yogananthy AS Thambaiya v Idris Osman* [2002] 7 CLJ 531 in support of her opinion. As regards the application by the appellant's former solicitors to discharge themselves on the morning of the trial, Her Ladyship ruled that there is nothing in the RHC which precluded the court from hearing the oral application by the former solicitors to discharge themselves.

THE APPELLANT'S CASE

[9] Learned counsel for the appellant submitted before us that the paramount consideration in an application to reinstate a matter is whether the appellant had a reasonable explanation for his absence. Counsel cited to us the case of *Shocked & Anor v Goldschimdt & Ors* [1998] 1 All ER 372 as authority for the proposition that unless there is evidence that a party to the litigation had made a deliberate election not to attend trial, that the absenting party cannot be taken to have waived or forfeited its right or opportunity to attend court. In this context, counsel contended that when considering an application to reinstate, it is the duty of the court to balance the two competing interests of ensuring finality in litigation as a matter of legal principle against the likelihood of a real miscarriage of justice on the facts if reinstatement is disallowed. Counsel then referred us to the majority decision of this court in the case of *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610. Applying the facts of this case to the pronouncements of the court in the cases of *Shocked & Anor v Goldschimdt & Ors* and *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors*, counsel for the appellant submitted that there was no evidence that the appellant had made a deliberate decision not to attend the trial fixed for hearing on 23 March 2011. On the contrary, counsel submitted that the appellant had a reasonable explanation for not attending court and this had everything to do with the conduct of counsel for the respondent ie giving the

impression to the former solicitor's for the appellant that they would not seriously oppose any application to adjourn the trial since they were also not ready with their witness.

THE RESPONDENT'S CASE

[10] The thrust of the submission of counsel for the respondent was that the striking out of the appellant's claim was fully justified since the appellants had failed to attend court notwithstanding having knowledge, some six months earlier, that their claim had been fixed for hearing on 25 March 2011. With reference to O 35 r 1(2) of the RHC, learned counsel for the respondent submitted that in all cases where a party to the litigation is absent when the matter is called up for hearing, the court is at liberty to strike out the claim and proceed with the counterclaim. Counsel then referred us to the passage in the judgment of Gopal Sri Ram (as His Lordship then was):

> [6] Here, the applicants and their legal advisers were absent at the trial. The judge heard the evidence led by the respondents on the issue of liability and, acting in accordance with settled adjectival law, accepted it. He also believed the evidence led in respect of quantum. He had no evidence going the other way on either issue. So you really cannot blame the judge for acting on the evidence before him. The applicants' complaint of a failure of justice is therefore without any substance (see p 901 of the reported judgment of the court in the case of *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; [2010] 3 CLJ 895)

and contended that the judgment obtained by the respondent on the counterclaim was clearly a regular judgment since it was granted after the respondent had led evidence on the same.

LAW ON SETTING ASIDE OF THE DEFAULT JUDGMENT

[11] Generally the position in Malaysia is similar to that in the United Kingdom in that a court of law when considering an application to set aside a default judgment after trial should have regard to the following factors:

> (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so. (4) The court will not consider

> setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delaying in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) in considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered; where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.
>
> (See Leggatt LJ at p 381 of the reported judgment of the court in *Shocked & Anor v Goldschimdt & Ors*)

[12] This court adopted the approach followed by Leggatt LJ in *Shocked & Anor v Goldschimdt & Ors* when dealing with an application to set aside a default judgment obtained following a trial. James Foong JCA (as His Lordship then was) after adopting as correct the aforesaid passage in the judgment of Leggatt LJ opined that:

> The reason for the absence of the party at the trial has become the predominant consideration over that of a defence of merit.

represented the position in Malaysia as well, (see *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 at p 630).

This court in the *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* case after examining the reasons advanced by the appellant for his absence at the trial, by a majority concluded that on the facts of that case the appellant's solicitors mistake in recording the date of hearing could not be accepted as a good reason for their absence at the trial. The majority decision of this court in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* represents the current state of the law when dealing with an application to set aside a default judgment after trial as leave was not granted to the applicant to appeal against the majority decision.

DECISION OF THE COURT

[13] We accept the current state of the law on this subject to be that contained in the majority decision of this court in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors*. In other words, the mistake of the legal representative of the appellant cannot constitute a valid excuse for the appellant's absence in court. However, in our judgment, there is one significant fact which distinguishes the facts of this case from the cases of

Shocked & Anor v Goldschimdt & Ors and *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors*. That is this. In this case, unlike the cases of *Shocked & Anor v Goldschimdt & Ors* and *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors*, counsel for the appellant was present in court when the appellant's claim was called for trial. In other words, a legally recognised agent of the appellant in the form of its former solicitor was present to safeguard its interest at the commencement of the trial. Accordingly, in our judgment, this is not a case where only one party was present when the appellant's claim was called for trial so as to enable the court to proceed under O 35 r 1(2). The state of affairs whereby only one party was present during the trial came about as a result of the learned trial judge's decision to first entertain the oral application by the appellant's former solicitors to discharge themselves and more importantly to then allow the application.

[14] In our judgment, if the learned trial judge was proposing to proceed with the trial, with respect, Her Ladyship should have either dismissed the application for discharge or alternatively if Her Ladyship was inclined to allow the application, then, at the very least, adjourned the trial of the claim and the counterclaim to the following day bearing in mind that the trial was fixed for hearing over three days. Furthermore, it should have occurred to Her Ladyship that this was the most prudent thing to do since the appellant was a locally incorporated company operating in the city. Such an adjournment conditional on the former solicitors notifying the appellant of the new date of trial would have enabled Her Ladyship to ascertain why the appellant was absent and secondly, ascertain the appellant's intention as regards the claim and the counterclaim. In our judgment, quite apart from the validity of the reasons for the appellant's absence on the morning of the trial, there is the issue of O 64 r 5(1) of the RHC. According to this rule, the appellant's solicitors continued to be the solicitors for the appellant unless and until they were served with a copy of the order. In other words, O 64 r 5(1) read with O 35 r 1(2) implies that the former solicitors of the appellant continued to be solicitor for the appellant, notwithstanding, the order of the learned trial judge allowing their oral application for discharge. For this reason, the appellant was entitled to assume that it was legally represented throughout the trial when this was clearly not the case. There is no evidence that the appellants were served at all with the order of discharge. In our judgment, the judge's action in proceeding with the trial without regard to the protection afforded to the appellant by O 64 r 5(1) amounted to a serious miscarriage of justice and a ground in itself to re-instate the appellant's claim and set aside the judgment of the court of 12 May 2009 allowing the respondent's counterclaim.

[15] In our judgment, even if we are wrong in allowing this appeal, based on the learned trial judge's failure to provide the appellant with the opportunity to

be legally represented following the discharge of its former solicitors, the appellant has complied with the factors adopted by this court in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors*. First, the appellant had no prior notice that its former solicitors would be applying to discharge themselves. Secondly, based on the rules of court, the appellant was entitled to assume that its legal representation would not be removed without it being notified in advance. Thirdly, there is credible evidence that the appellant did not attend the trial due to their former solicitors reliance on an oral agreement purportedly reached by them with the solicitors for the respondent that the respondent's solicitors would not object to any application by the appellant's solicitors for the postponement. Apparently, the respondent's solicitors were also not ready with their witness. This claim of the appellant's former solicitors is not without any foundation as the respondent's solicitors have not filed an affidavit disputing the claim of the appellant's former solicitors that the respondent's solicitors only opposed the appellant's former solicitors application for the postponement of the trial when the judge insisted that they take a position one way or another after initially leaving the matter to the court. In other words, it is reasonable to conclude that the appellant's absence in court on the morning of the trial was more likely due to a misunderstanding between the two solicitors rather than due to a conscious decision by the appellant not to attend court. Admittedly, it was wrong of the appellant's former solicitors to have assumed that the court would grant the adjournment and not require the appellant to attend court. Be that as it may, the predominant factor to be considered by the court in an application of this nature is whether the appellant's conduct amounted to an election on its part to not attend court. With respect, there is no evidence that the appellant made a conscious decision to not attend the trial. Unfortunately, the learned judge in Her Ladyship's judgment does not appear to have examined the reasons provided by the appellant for not attending the court as evidenced by Her Ladyship's finding that:

> To say that the solicitor could not be in touch with the plaintiff to get instruction is not predominant consideration for the court to consider, (see *Yogananthy AS Thambaiya v Idris Osman* [2002] 7 CLJ 531).

[16] As regards the third factor, in our opinion, a re-trial of the appellant's claim and the respondent's counterclaim will not entail the court in undertaking a fresh protracted exercise of investigating the facts as it is evident from the notes of evidence maintained by the learned trial judge that the trial of the counterclaim was completed fairly quickly. The only witness of the respondent appears to have merely read out his witness statement without a single question being posed to him by either the learned trial judge or counsel for the respondent. This brings us to the issue of the prospect of success. In our judgment, the counterclaim of the respondent ought to have been more closely examined by the learned trial judge as it is highly incredible that a machine

purchased by the respondent for a mere RM114,978.50 is capable of generating profits as opposed to revenue of RM17,210,289.98 per annum. According to the evidence of this witness, this profit was possible because the machine was operational 24 hours per day for 356 days in a year without a break for the servicing of the machine and allowing for depreciation (see p 72 of AR). In our opinion, the margin of profit running into a few thousand per cent clearly demanded close examination of the respondent's evidence led in support of the respondent's counterclaim by the learned trial judge. There is nothing to suggest that the learned trial judge did this as no grounds have been provided by Her Ladyship to-date. Furthermore, is it not incredible that the same respondent who is now claiming millions purportedly because the machine supplied by the appellant was useless, employed security guards to prevent the removal of this same 'useless machine' by the appellant in purported reliance of a Romalpa clause in the agreement (see para 13 of the statement of defence and counterclaim).

[17] Leggatt LJ in *Shocked & Anor v Goldschimdt & Ors* recognized that the court's decision in an application of this nature must vary depending on its own facts and that the weight to be accorded to the relevant factors will alter accordingly (see p 381 of the reported judgment of the court). In our judgment, the three factors which should carry the most weight on the facts of this case are that the appellant did not consciously make a decision to not attend court; filed this application promptly and the prospect of success are good since there are no grounds of decision to support the learned judge's decision to allow the respondent's counterclaim literally as pleaded. We readily concede that in applications of this nature, this court is required to have regard to the competing interests of ensuring finality in litigation whilst simultaneously ensuring that there is no real miscarriage of justice as a matter of fact. However, we are satisfied after a careful consideration of the aforesaid two competing interests, that the justice of the case demands that there should be a re-trial. With utmost respect to the learned trial judge, the fact that the trial proceeded in the absence of the appellant at trial affords no justification for not providing the grounds for the judgment requiring the appellant to pay millions with further damages to be assessed to the respondent. A re-trial will also address this anomaly.

[18] Accordingly, we allow the appeal and set aside the order of the Shah Alam High Court of 25 May 2009 and order the reinstatement of the appellant's claim for trial. We also hereby set aside the judgment of the Shah Alam High Court of 12 May 2009 and order that the respondent's counterclaim be set down for trial. To facilitate the trial of the claim and

counterclaim, we order that this matter be fixed for mention in the Shah Alam High Court. We make no order as to costs. Deposit refunded to the appellant.

Appeal allowed and order set aside with no order as to costs.

Reported by Ibnu Aswan